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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 209

RAILROAD TRANSFER SERVICE, INC., A DELAWARE CORPORATION,

Petitioner,

vs.

THE CITY OF CHICAGO, A MUNICIPAL CORPORATION; RICHARD J. DALEY, NOT INDIVIDUALLY, BUT AS MAYOR OF THE CITY OF CHICAGO; RAYMOND F. SIMON, NOT INDIVIDUALLY, BUT AS CORPORATION COUNSEL OF THE CITY OF CHICAGO; ORLANDO WILSON, NOT INDIVIDUALLY, BUT AS SUPERINTENDENT OF POLICE OF THE CITY OF CHICAGO; AND JAMES CARTER, NOT INDIVIDUALLY, BUT AS PUBLIC VEHICLE LICENSE COMMISSIONER OF THE CITY OF CHICAGO,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONER'S BRIEF.

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PETITIONER'S BRIEF.

OPINIONS BELOW.

The opinion of the Court of Appeals here under review (R. 148) and the dissenting opinion (R. 155) are reported in 358 F. 2d 55, 59. The Court of Appeals affirmed a judg-

ment of the United States District Court for the Northern District of Illinois.

There were two opinions by the District Court and one earlier opinion by the Court of Appeals. The first District Court opinion (R. 132), granting respondents' motion to dismiss the complaint, is not reported. The Court of Appeals vacated this judgment on the ground that, unknown to the District Court, the ordinance in issue had been amended in 1963 during the litigation and before the judgment was entered. 334 F. 2d 991, 993 (1964), Appendix A hereto. The remand called for consideration of the effect of the amendment. The District Court's second opinion (R. 141), granting respondents' motion to dismiss petitioner's second amended complaint, is not reported.

JURISDICTION.

Jurisdiction is conferred upon this Court to review the judgment of the Court of Appeals by certiorari by 28 U. S. C. § 1254(1), 62 Stat. 928. Certiorari was granted October 10, 1966. The judgment of the Court of Appeals was entered March 10, 1966, and petition for certiorari was filed June 6, 1966. Jurisdiction of the District Court rests upon 28 U. S. C. § 1337, 62 Stat. 931, because the action arises under provisions of the Interstate Commerce Act.

STATUTES INVOLVED.

This cause involves the conflict of provisions of Chapter 28 of the Municipal Code of Chicago with the Commerce Clause of the Constitution and parts of the Interstate Commerce Act.

Chapter 28 of the Municipal Code of Chicago, with amendments since 1955, is printed in full in the Record, pp. 19-46. Pertinent provisions are set forth in Appendix B hereto.

Sections 1(4), 3(4) and 202(c) of the Interstate Commerce Act, 49 U. S. C. §§ 1(4), 3(4), 302(c); 54 Stat. 900, 903; 56 Stat. 300, are printed in Appendix C hereto.

The Commerce Clause of the Constitution, Art. I, Sec. 8, Cl. 3: "The Congress shall have Power . . . To regulate Commerce . . . among the several States. . . ."

QUESTIONS PRESENTED FOR REVIEW.

1.

Whether petitioner, a motor carrier engaged by contract with Chicago railroads in tranferring interstate passengers between railroad stations in Chicago under authority of the Interstate Commerce Act, and receiving its entire compensation from the railroads, may be compelled by a Chicago ordinance to file *annually* an application for authority to perform the transfer service where granting the application is conditioned upon—

a. A finding by a City official after investigation "that the applicant is qualified to pursue the occupation of a . . . coachman," the word "coachman" including petitioner by definition, and the word "qualified" being by context not related to traffic safety;

b. Total compliance with the requirements of the ordinance.

2.

Whether Chicago may by the ordinance compel petitioner—

a. To file annually with the City a comprehensive and detailed statement of its expenses and earnings in performing its transfer contract, and its balance sheet;

b. To afford City officials access to its business and financial books and records;

c. To employ only residents of Chicago as drivers of its vehicles;

d. To maintain its principal place of business in Chicago.

3.

Whether the instant action for a declaratory judgment that the contested provisions of the ordinance are invalid, and for an injunction against their enforcement, is appropriate and not premature.

STATEMENT OF THE CASE.

This action has its roots in the events that led to *Chicago v. Atchison, Topeka and Santa Fe Ry. Co.*, 357 U. S. 77 (1958). For many years before 1955 the Chicago railroads employed Parmelee Transportation Company to carry passengers traveling through Chicago from their incoming to their outgoing railroad stations. During this period, a licensing ordinance that regulated various classes of "public passenger vehicles" included and defined a "terminal vehicle" as one that is operated under contracts with railroads exclusively for the transfer of railroad passengers between terminal stations. In June, 1955, the railroads advised Parmelee that, effective October 1, 1955, they would discontinue their arrangements with Parmelee and would engage petitioner to perform the transfer service. In July, 1955, the Chicago City Council amended the ordinance so as to: (1) eliminate the contract requirement from the definition of terminal vehicle; (2) grant Parmelee automatically renewable terminal vehicle licenses in perpetuity for all of its vehicles and for replacement of existing vehicles; and (3) compel any new applicant for a terminal vehicle license to prove to the City Public Vehicle License Commissioner that the new service was required by the public convenience and necessity. See

357 U. S. at 79-81. This Court on June 16, 1958, held the amendment invalid because in conflict with the Interstate Commerce Act. *Id.* at 85. Petitioner has continued to perform the interstation transfer service ever since October 1, 1955.

The Court described the transfer service as follows:

> "Chicago is one of the Nation's great rail centers. Each day thousands of railroad passengers travel through that city on continuous journeys from one State to another. Since the lines of all railroads which carry passengers into and out of Chicago come to an end in one of that city's eight terminals, through passengers frequently arrive at a station different from the one where they are to board their outgoing train and must transfer with their baggage in order to continue their trip. Because of the serious problems of scheduling and passenger convenience involved in this interchange, the railroads, as a group, have long provided for the transfer of through passengers from one station to another by a systematic and highly organized motor carrier operation. Generally the passengers receive a coupon covering this transfer service, without special charge, as part of their through ticket." (357 U. S. at 79.)

Soon after the decision in *Atchison,* beginning in 1959, the Chicago City Council renewed its harassment of petitioner by various amendments to the public passenger vehicle ordinance. The amendments repealed the requirement of proof of public convenience and necessity, but by new sections and additions to old sections they created new economic regulation of terminal vehicles aimed squarely at petitioner.

In 1959, an amendment to § 28-6 added to the ordinance as a condition to issuance of an *annual* license the requirement that the Commissioner "shall find that the applicant is qualified to pursue the occupation of a cabman or coachman" (App. B, R. 27). The definition of coachman in-

cludes the operator of terminal vehicles (App. B, R. 27). This amendment is not related in context to traffic safety; instead it implements or is implemented by other post-1958 amendments providing economic regulation.

An amendment added in 1959, § 28-5.1 (App. B, R. 28) requires that all "corporate applicants for public passenger vehicle licenses shall . . . have their principal places of business in the City of Chicago."

In 1963 a section theretofore applicable only to taxicab operators, § 28-30.1, was amended so as to cover "every . . . corporation", thus bringing petitioner within its terms. This section (App. B, R. 43) provides that every corporation shall keep accurate books of account at its Chicago office and shall annually on or before May 1 file with the Commissioner a profit and loss statement for the preceding calendar year showing in great detail its earnings and expenses, and its balance sheet at the end of the year. The Commissioner is granted access to the corporation's records "during normal business hours." As we have noted above, the first opinion of the Court of Appeals, 334 F. 2d 991, App. A, remanding to the District Court, called for consideration of the 1963 amendments.

The definition of "chauffeur" in § 28-1 of the ordinance (App. B, R. 19) requires the construction that drivers of petitioner's vehicles must be residents of Chicago.

The 1959 amendments were made effective on January 1, 1960 (R. 30, Sec. 7). On August 19, 1960, the Public Vehicle License Commissioner demanded that petitioner immediately make application for licenses and comply with the ordinance (R. 66, 125). On August 26, 1960, petitioner made application for licenses for its vehicles and tendered the required fees, under protest, in order to protect its right to seek judicial relief (R. 125). The City refused to accept an application with a protest and advised that unless

the protest was withdrawn petitioner's vehicles would not be permitted to operate (R. 125). Thereupon petitioner, conceiving itself faced with an emergency, paid the 1960 license fees and partially complied with the ordinance in other respects (R. 126).

On September 23, 1960, petitioner commenced the instant action by filing its complaint in the District Court for declaratory judgment that the ordinance is in conflict with the Interstate Commerce Act and the Commerce Clause (R. 2). The case eventually went to final hearing on petitioner's second amended complaint for declaratory judgment and injunction filed September 29, 1964 (R. 5-49) and affidavit (R. 125), and respondents' motion to dismiss (R. 49-66) and affidavit (R. 66-124).

License fees accruing annually after 1960 were deposited by petitioner with the clerk of the District Court to be held pending final disposition of the case (R. 68-69, 139-140).

SUMMARY OF ARGUMENT.

I.

The amendments of 1959 and 1963 to Chapter 28 of the Municipal Code of Chicago are invalid on their face under the Interstate Commerce Act and the Commerce Clause of the Constitution. The contrary holding of the Court of Appeals conflicts with *Chicago* v. *Atchison, Topeka & Santa Fe Railway Company*, 357 U. S. 77 (1958), and other decisions of this Court.

A. The requirement of § 28-6 that petitioner must prove *annually* to the City's satisfaction that it is "qualified to pursue the occupation of" transferring interstate passengers between railroad stations, as a fixed condition to the right to perform the service, conflicts with §§ 1(4), 3(4), and 202(c)(2) of the Interstate Commerce Act, 49 U. S. C. §§ 1(4), 3(4), 302(c)(2). These sections confer on the railroads the exclusive right to select a transfer agent of their own choosing free from any interference by the City. Whether an agent is "qualified to pursue the occupation of" transferring passengers between stations is the sole concern of the railroads, not the City. By § 202(c)(2) Congress has expressed its policy that railroads are competent to select agents who are "qualified to pursue the occupation of" performing the transfer service, unhindered by local authorities.

This clause of § 28-6 was enacted at the same time that the City Council repealed the requirement for proof of public convenience and necessity that was declared invalid in *Atchison*. The history of this clause and its structure within § 28-6 show that it was intended by a hostile City Council as a further harassment of petitioner. If the City

had wished in good faith to conform to the mandate of *Atchison* and limit its regulation of petitioner to simple licensing and lawful police regulations it easily could have done so, instead of arrogating to itself every year the right to determine whether petitioner is "qualified to pursue the occupation of" transferring passengers. This clause is clearly set forth in § 28-6 as a requirement that is entirely separated from and independent of ordinary licensing and safety provisions. It is, as it shows on its face, a restrictive regulation of an occupation of engaging in interstate commerce that has been specifically authorized by Congress.

Where, as here, Federal legislation has granted a specific right to engage in interstate commerce, this Court has steadfastly held invalid on its face, for more than one hundred and forty years, every form of state or local enactment that has asserted power to determine whether that right shall be enjoyed.

B. The requirements of Ch. 28 that petitioner shall file extensive financial reports with the Public Vehicle License Commissioner, shall give the Commissioner access to its books and records, shall have its principal place of business in Chicago, and shall employ only residents of Chicago as chauffeurs, are invalid under the Interstate Commerce Act and the Commerce Clause because they are wholly unrelated to any lawful regulation that may be exerted against petitioner under the police power. All but the last of these were enacted as amendments to Ch. 28 in 1959 and 1963, and the form of their enactment shows that they were aimed squarely at petitioner.

Filing extensive financial reports and allowing the Commissioner to inspect petitioner's books has no conceivable relation to any form of regulation that can lawfully be asserted by the City over the interstation transfer operation. Petitioner was brought within the scope of this requirement by an amendment making petitioner subject to a

section which theretofore regulated only taxicab companies. This, along with the provision of § 28-6 discussed above, evidenced the City's intention to treat the interstation transfer service as if it were intrastate commerce.

Petitioner, a Delaware corporation authorized to do business in Illinois, cannot lawfully be compelled to maintain its principal place of business in Chicago. Since a corporation may have only one principal place of business, this provision would impose an intolerable burden upon petitioner and other interstate carriers. This requirement has nothing to do with reasonable requirements for the maintenance of registered agents, local offices, and posting of sufficient insurance coverage. Again, the form of the enactment is harassment and not reasonable regulation.

Requiring that petitioner's drivers be residents of Chicago is a wholly unnecessary burden that limits petitioner's employing potential. Whatever reasons there may be for applying this restriction to roving taxicab drivers do not exist as to the limited interstation transfer operation that is performed by petitioner as agent for the railroads.

II.

The instant action is appropriate and is not premature, and the contrary holding of the Court of Appeals is in conflict with decisions of this Court. The ordinance is invalid on its face and the City has advised petitioner that unless petitioner complies with all of its terms petitioner will be denied the use of the streets. In these circumstances petitioner need not apply for a license but can request the judicial relief here sought. To compel petitioner to file annually an application which, by the express terms of § 28-6, the City reserves the right to deny, is of itself a violation of petitioner's rights under the Interstate Commerce Act and the Commerce Clause.

Petitioner has the responsibility of transferring thousands of passengers between the railroad stations every day, and it must maintain a fleet of specialized motor vehicles and a highly experienced staff. It cannot be subjected to the uncertainty every year as to whether a city official, representing an obviously hostile City Council, is going to certify that it is "qualified to pursue the occupation of" transferring passengers.

The terms of the ordinance are proof of the City's hostility to petitioner, and this obvious hostility furnishes ground for the relief that petitioner seeks. The City has expressed its will and policy in the ordinance. Neither counsel for the City nor any other of its representatives can be heard to say that the ordinance will not be enforced according to its terms. As long as the ordinance remains in effect petitioner is in constant danger of stoppage of its operations and cumulative criminal penalties.

ARGUMENT.

I.

THE AMENDMENTS OF 1959 AND 1963 TO CHAPTER 28 OF THE MUNICIPAL CODE OF CHICAGO ARE INVALID ON THEIR FACE UNDER THE INTERSTATE COMMERCE ACT AND THE COMMERCE CLAUSE OF THE CONSTITUTION. THE CONTRARY HOLDING OF THE COURT OF APPEALS CONFLICTS WITH CHICAGO v. ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, 357 U. S. 77, AND OTHER DECISIONS OF THIS COURT.

A. In Respect to the Requirement That Petitioner Must Establish Annually to the City's Satisfaction That It Is "Qualified to Pursue the Occupation of a . . . Coachman" in Order to Obtain the Right to Operate.

The Court of Appeals concluded that Chapter 28 is not in any part invalid on its face: "As written, however, the ordinance does not collide with federal preemption. . . . [T]he ordinance is not offensive on its face. . . ." 358 F. 2d at 57 (R. 151, 152). This holding conflicts with *Chicago* v. *Atchison, Topeka & Santa Fe Railway Company*, 357 U. S. 77 (1958), and other decisions of this Court. The requirement that petitioner must prove annually to the satisfaction of the City Public Vehicle License Commissioner that it "is qualified to pursue the occupation of a . . . coachman" as a fixed condition to the right to perform the interstation transfer service, unlawfully invades a field preempted from state regulation by §§ 1(4), 3(4), and 202(c)(2) of the Interstate Commerce Act, 49 U. S. C. §§ 1(4), 3(4), 302(c)(2), 54 Stat. 900, 903, 56 Stat. 300. *Atchison*, 357 U. S. at 84-87.

In *Atchison* the Court made a detailed analysis to show

that these sections of the Act superseded the provisions of the Chicago ordinance that would require, from a carrier engaged by the railroads to perform the interstation transfer service, proof that the carrier's service was required by the public convenience and necessity. The Court actually made two holdings. It decided that by force of these sections the City could not exercise any veto power over the performance of the service. More important perhaps, it also held that § 202(c)(2) authorized the railroads to select an agent *of their own choosing* to perform interstation transfer free from any interference by the City. (357 U. S. at 85-88.) "We believe the Act authorizes the railroads to engage in this transfer operation themselves or to select such agents as they see fit for that purpose without leave from local authorities." (p. 87.)

The crucial issue was whether the City or the railroads should have the power to select the transfer agent. Under the ordinance, "Parmelee was permitted to continue operating without leave from the City since an exception in § 28-31.1 provided that no certificate was necessary for the renewal of an existing license" (p. 81); but a new applicant had to prove that public convenience and necessity required his operation (p. 80). Thus the ordinance gave that power exclusively to the City. The Court went to some length to point out why that provision was in conflict with the Act and why under the Act the selecting power must belong exclusively to the railroads without any restraint by the City. The Court said in part:

> "National rather than local control of interstate railroad transportation has long been the policy of Congress. It is not at all extraordinary that Congress should extend freedom from local restraints to the movement of interstate traffic between railroad terminals. Serious impediments to the efficient and uninterrupted flow of this traffic might well result if the City could deny the railroads the right to transfer

passengers by their own vehicles or by those of their selected agents. For example, the railroads here undoubtedly have a better understanding of how to handle the transportation problems involved in expeditiously moving thousands of passengers from station to station each day than do local officials. Because of close time schedules, the great volume of traffic and its irregular ebb and flow, the railroads obviously need a cooperative and dependable transfer operator with suitable equipment who is willing to work in close harmony with them. The railroads have rejected as unsuitable the only transfer service now licensed to operate by the City. If local officials can prevent them from providing this service by some other means a breakdown in the organized transfer of passengers could result. At a minimum they would be forced to deal again with the rejected operator." (pp. 87-88.)

It is plain from this language that the railroads have the exclusive right to decide whether their selected transfer agent is "qualified to pursue the occupation of" transferring passengers, that their decision is not subject to review by the City, and that the City has no right whatsoever to exercise any examining or selective power in this respect. Congress by § 202(c)(2) has extended "freedom from local restraints to the movement of interstate traffic between railroad terminals" (pp. 87-88), and has thereby expressed its policy that the railroads are competent to select agents who are "qualified to pursue the occupation" of performing the transfer service, unhindered by local authorities.

Nevertheless, the City now asserts by the ordinance in issue that it has the power every year to require that petitioner must establish to the City's satisfaction that petition is "qualified to pursue the occupation of" transferring passengers before it may continue to operate.

After the decision in *Atchison*, holding invalid the re-

quirement that petitioner must obtain a certificate of public convenience and necessity in order to perform the interstation transfer service, the City amended the ordinance. The City repealed (R. 30, Sec. 6) the public convenience and necessity section struck down by this Court (Sec. 28-31.1; 357 U. S. at 80) but at the same time amended § 28-6 in the same ordinance by adding a new requirement that petitioner must prove *annually* to the License Commissioner that it is "qualified to pursue the occupation of a . . . coachman" before the license to transfer passengers between stations may be granted.

Thus, in 1958, at the time of the decision in *Atchison*, § 28-6 of the ordinance was the following (R. 20-21):

> "Upon receipt of an application for a public passenger vehicle license the commissioner shall cause an investigation to be made of the character and reputation of the applicant as a law abiding citizen; the financial ability of the applicant to render safe and comfortable transportation service, to maintain or replace the equipment for such service and to pay all judgments and awards which may be rendered for any cause arising out of the operation of a public passenger vehicle during the license period. If the commissioner shall find that the applicant is qualified and that the vehicle for which a license is applied for is in safe and proper condition as provided in this chapter, the commissioner shall issue a public passenger vehicle license to the owner of the vehicle for the license period ending on the thirty-first day of December following the date of its issuance, subject to payment of the public passenger vehicle license fee for the current year. [Passed. Coun. J. 12-20-51. p. 1596: amend. 4-16-52. p. 2178.]"

In 1959, as stated above, the City amended § 28-6 by striking out the last sentence and substituting therefor the following (R. 27, Sec. 2):

> "If the commissioner shall find that the application, and all other statements and documents required to be

> filed with said application have been properly executed *and that the applicant is qualified to pursue the occupation of a cabman or coachman,* the commissioner shall issue to him and in his name a license for each public passenger vehicle applied for, to terminate on the 31st day of December following the date of issue, provided that each said vehicle is registered in applicant's name and is in safe and proper condition at the time the license is issued." (Emphasis supplied.)

It is plain that the amendment added nothing to § 28-6, or to any other section, that pertained to safety of operation and equipment. But it did add the requirement that the Commissioner is to consider *each year* whether "the applicant is *qualified to pursue the occupation* of a cabman or coachman." This clause is phrased strictly in terms of economic regulation that cannot be applied by the city to interstate commerce. On its face this clause arrogates to the City the power to exercise judgment as to whether or not the agent chosen by the railroads should be allowed to perform the transfer service. The City is here, as in *Atchison,* claiming "at least some power . . . to decide whether a motor carrier may transport passengers from one station to another." 357 U. S. at 85.

It is to be particularly noted that the 1959 amendment to § 28-6 was so drawn as to set out the clause, "qualified to pursue the occupation of a . . . coachman," as a complete requirement wholly independent of the other provisions of the section, or of the ordinance, that could be the subject of legitimate local concern such as traffic regulation. In terms and intent this clause sets up a separate and independent power of economic regulation. A brief analysis will make this clear. The first clause of the amendment is:

> "If the commissioner shall find that the application, and all other statements and documents required to be filed with said application have been properly executed"

That is complete. Then follows:

> "*and* that the applicant is qualified to pursue the occupation of a cabman or coachman," (Emphasis supplied).

That is complete. It has no relation to any other requirement of the ordinance, either preceding or following it. Then follows:

> "the commissioner shall issue to him and in his name a license for each public passenger vehicle applied for, to terminate on the 31st day of December following the date of issue, *providing that each said vehicle is registered in applicant's name and is in safe and proper condition at the time the license is issued.*" (Emphasis supplied).

The last emphasized clause calls for a finding by the commissioner that is entirely apart from and unrelated to whether "applicant is qualified to pursue the occupation of a . . . coachman."

In *Adams Express Co.* v. *New York*, 232 U. S. 14 (1914), the Court made a similar analysis of a New York ordinance, and concluded that it imposed regulation upon local deliveries by express vehicles that conflicted with the provisions of the Interstate Commerce Act (34 Stat. 584, 49 U. S. C. § 1(3)(a)) regulating express companies, saying in part:

> 'The requirements of §§ 305 and 306 . . . cannot . . . be considered as a regulation in the interest of safety in street traffic. Other ordinances provide for the 'rules of the road' to which wagons of express companies, as well as those of other persons, are subject. . . . The sections now under consideration constitute a regulation of the express 'business.' Article I is entitled, 'Business Requiring a License;' § 305, containing the enumeration, provides that 'the following businesses must be duly licensed;' and § 306, that 'no person shall engage in or carry on any such business without a license therefor. . . .' [W]hile such a requirement may be proper in the case of local or intrastate busi-

ness, it cannot be justified as a prerequisite to the conduct of the business that is interstate. . . . [I]n the present instance, Congress has exercised its authority and has provided its own scheme of regulation in order to secure the discharge of the public obligations that the business involves." 232 U. S. at 31-32.

In the case at bar petitioner is confronted with a more burdensome obligation in seeking the right to engage in interstate commerce than was imposed in *Adams Express*. There the city retained no discretion to deny the right. Moreover, the amendment to § 28-6 imposes a more onerous burden than the proof of public convenience and necessity requirement of former § 28-31.1 involved in *Atchison*. Public convenience and necessity had to be established only once; annual renewals of licenses could be had without proof of public convenience and necessity. 357 U. S. at 80, n. 1. But the amendment to § 28-6 requires petitioner to prove *every year* to the satisfaction of the Public Vehicle License Commissioner that it is "qualified to pursue the occupation of" engaging in interstate commerce that is authorized by §§ 1(4), 3(4), and 202(c)(2) of the Interstate Commerce Act.

The setting in which this amendment was enacted emphasizes its meaning. Having been defeated in its effort to compel petitioner to prove public convenience and necessity, the City in an obvious and blatant effort to avoid the clear meaning of this Court's decision merely substituted therefor the requirement that petitioner prove that it is qualified before a license is issued.

Whether petitioner is qualified to operate as a carrier in interstate commerce transferring passengers between railroad stations under a contract with the railroads, pursuant to provisions of the Interstate Commerce Act, is the concern of the railroads and the Interstate Commerce Commission, not of the City of Chicago. Indeed, this Court has

already stated in crystal clear language: "The Act authorizes the railroads to engage in this transfer operation themselves or to select such agents as they see fit for that purpose without leave from local authorities." *Atchison*, 357 U. S. at 87.

In *Atchison* the Court said in respect to the public convenience and necessity requirement:

> "Although counsel for the City denies that it will use this power to exclude proposed transfer operations wholly or primarily because of economic considerations . . . it is clear that the City claims *at least some power* under § 28-31.1 to decide whether a motor carrier may transport passengers from one station to another." 357 U. S. at 85. (Emphasis added.)

Later in the opinion the Court pointed out:

> "Of course the City retains considerable authority to regulate how Transfer's vehicles shall be operated. It could hardly be denied, for example, that such vehicles must obey traffic signals, speed limits and other general safety regulations. Similarly the City may require registration of those vehicles and exact reasonable fees for their use of the local streets." (p. 88.)

The City has not complied with the mandate of this Court to restrict its regulation to general safety matters and the exaction of reasonable fees for the use of its streets. Instead, it has continued to claim "at least some power" to determine whether petitioner has a right to operate even if it complies with general safety regulations and pays its license fees.[1] Once again, therefore, petitioner is required to seek relief from this Court.

Harman v. *Forssenius*, 380 U. S. 528 (1965), presents a

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1. We are not aware of any ground for the statement of the Court of Appeals, 358 F. 2d at 57, footnote 2, that "Chicago now admits that it has no power to stop Transfer's operations in interstate commerce."

similar case of die-hard effort to impair Constitutional rights. A state law required a voter who did not pay the outlawed poll tax to file in every election year a form which amounted to an application for the right to vote. Terming this a "cumbersome procedure" (pp. 541-542) designed to circumvent rights granted by the Twenty-fourth Amendment, the Court held it invalid. Similarly, a requirement that petitioner shall *every year* prove to the satisfaction of the City that it is "qualified to pursue the occupation" of transferring passengers, is a "cumbersome procedure" that violates petitioner's rights under the Commerce Clause and the Interstate Commerce Act. Paraphrasing the Court's opinion (pp. 540-541): The Commerce Clause, like the Twenty-fourth Amendment, "nullifies sophisticated as well as simple-minded modes of impairing the right granted. . . . It hits onerous procedural requirements which effectively handicap exercise of" Federally granted rights (380 U. S. at 540-541).

The Court's holdings in *Atchison,* 357 U. S. 77, and *Adams Express,* 232 U. S. 14, are far from being isolated expressions. Where, as here, Federal legislation has granted a specific right to engage in interstate commerce, the Court has steadfastly held invalid on its face every form of state or local enactment that has asserted power to determine whether that right shall be enjoyed. *Gibbons* v. *Ogden,* 9 Wheat. 1 (1824); *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.,* 96 U. S. 1 (1878); *Bowman* v. *Chicago & North Western Railway Co.,* 125 U. S. 465, 484 (1888); *Western Union Telegraph Co.* v. *Attorney General,* 125 U. S. 530, 554 (1888); *Harman* v. *Chicago,* 147 U. S. 396, 406-407 (1893); *Castle* v. *Hayes Freight Lines, Inc.,* 348 U. S. 61, 65 (1954). Cf. *Public Utilities Commission of California* v. *United States,* 355 U. S. 534, 540 (1958). The case at bar simply calls for continued application of that rule.

B. In Respect to Requirements That Petitioner Shall File Financial Statements With the Commissioner, Shall Employ Only Chicago Residents as Chauffeurs, and Shall Have Its Principal Place of Business in Chicago.

The Court of Appeals summarized part of its holding as follows:

> "While the ultimate aim of the Chicago ordinance is not clear, the ordinance does have an apparent relation to responsibility. To require Transfer to maintain its office in Chicago, to have its drivers reside in Chicago, and to give proof of financial responsibility is but to establish accessible responsibility. Such requirements are reasonably within police powers of promotion of welfare."[2] (358 F. 2d at 58, R. 153.)

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2. The involved provisions of Chapter 28, Municipal Code of Chicago, are the following:

Sec. 28-5.1 *Qualifications.*) All corporate applicants for public passenger vehicle licenses shall be organized or qualified to do business under the laws of Illinois and have their principal places of business in the city of Chicago . . . [Passed August 24, 1959.] (R. 28.)

Sec. 28-1 *Definitions.*) "Chauffeur" means the driver of a public passenger vehicle licensed by the city of Chicago as a public chauffeur. [Passed 1951.] (R. 27.)

Sec. 28-30.1 *Books and Records.*) Every cabman, *corporation* and affiliate shall keep and provide accurate books and records of account of his operations at his place of business in the city. On or before May 1 of each year, every cabman, *corporation* and affiliate shall file with the Commissioner a profit and loss statement for the preceding calendar year, showing all his earnings and expenditures for operation, maintenance and repair of property, depreciation expense, premium paid for workmen's compensation and public liability insurance, and taxes paid for unemployment insurance and social security, and all state and local license fees, property taxes and Federal income taxes, and a balance sheet taken at the close of said year.

The Commissioner, or the authorized committee of the Council, shall have access to the property, books, contracts, accounts and records during normal business hours at said place of business, for such information as may be required for the effective administration and enforcement of the provisions of this chapter, or for the adoption of any ordinances, rules or regulations affecting taxicab operations.

In addition to the foregoing reports, each cabman shall within

Preliminarily the Court's textual error should be corrected. Section 28-5.1 demands not that petitioner shall maintain its office in Chicago, but that petitioner shall have its "principal place of business" there. There is of course a significant difference between these requirements.

The foregoing passage reveals again the Court's failure to comprehend the nature of the service performed by petitioner. The focus of the Court's error is the phrase "accessible responsibility." The Court overlooked that the Chicago railroads are totally responsible for the interstation transfer service, and are permanently accessible. Precisely in point is this Court's statement in *Atchison, supra,* 357 U. S. at 86:

> "Moreover, § 302(c) of the Act provides that motor vehicle transportation between terminals, whether performed by a railroad or by an agent or contractor of its choosing, shall be regarded as railroad transportation and shall be subject to the same comprehensive scheme of regulation which applies to such transportation."

Section 302(c)(2), 49 U. S. C., provides in pertinent part:

> "[T]ransportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to Part I . . . in the performance within terminal areas of transfer, collection, or delivery service . . . shall be considered to be performed by such carrier . . . as part of, and shall be regulated in the same manner as, the transportation by railroad . . . to which such services are incidental."

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thirty days after the six months' period ended December 31 and within thirty days after the six months' period ended June 30 of each year file a sworn statement with the Commissioner showing his gross fares collected and his operating expenses for the six months immediately preceding said dates.

(Part not italicized added in 1959, R. 28. Words italicized added in 1963. R. 43.)

The statement of the Court of Appeals set forth above strongly suggests that the Court was equating the interstation transfer service with taxicab service. This would be error, for as concerns the issues of this case the two are far apart. We pursue this point briefly because of the nature of the Court's statement and because respondents in their brief opposing certiorari relied upon the two taxicab cases that we refer to below. In the interstation transfer operation the passenger, without any effort on his part, is met and furnished at his incoming railroad station with a motor service which is vouched for in all respects by the railroads, and for which the passenger pays no charge to petitioner. The immense contrast between that operation and taxicab service appears in a description of the latter by the Court of Appeals itself in *Evanston Cab Co.* v. *Chicago*, 325 F. 2d 907 (7th Cir. 1963), cert. den. 377 U. S. 943. Holding that a taxicab company could be compelled to have its principal place of business in Chicago, the Court said, quoting from *Chicago* v. *Vokes*, 28 Ill. 2d 475, 480, 193 N. E. 2d 40, 44 (1963), cert. den. 377 U. S. 124:

> "By its very nature the taxicab industry directly and substantially provokes considerations of public safety and welfare. Its vehicles are constantly on the streets, day and night, and the members of the public who utilize them must place almost a blind trust in the fitness of their equipment and the competence of their drivers. Thus, not only does the operation of the business call for measures to protect others using the streets and highways, but also for regulations which insure the highest degree of safety for its passengers.
> * * *
> "If corporations licensed to operate taxis in the city of Chicago have no place of business there and do not maintain their records or equipment there, the functions of investigation, inspection and supervision required in the public interest would be ex-

ceedingly difficult if not impossible to completely and adequately perform . . .'"[3]

There is plainly nothing in the foregoing description of the need for municipal regulation of taxicab service that applies to the interstation transfer service furnished by petitioner pursuant to its contract with the railroads. Respondents' reliance on these taxicab cases in its brief opposing certiorari, p. 9, is misplaced. These differences arise out of the very nature of the two services. The transfer service is interstate commerce performed on behalf of the railroads under § 202(c)(2) of the Interstate Commerce Act; whereas taxicab service is purely intrastate, performed casually by roving drivers, free from any supercession by the Act, free from any supervision by the Interstate Commerce Commission or the railroads. *United States* v. *Yellow Cab Co.*, 332 U. S. 218 (1947).

The statement of the Court of Appeals set forth at the beginning of this subpart B is clearly in conflict with decisions of this Court. In respect to petitioner's specialized service, the contested provisions of the ordinance are properly characterized and condemned by *Frost & Frost Trucking Co.* v. *Railroad Commission*, 271 U. S. 583, 591 (1926):

> "[T]he act, as thus applied, is in no sense a regulation of the use of public highways. *It is a regulation of the business of those who are engaged in using them.*" (Emphasis supplied.)

The City may not impose the requirement that petitioner shall file annually with the City a detailed statement of its expenses and earnings, and its balance sheet, and afford the City access to its books. These matters are not conceivably

3. Since the demand of the ordinance is that the "public passenger vehicle" operator must have its "principal place of business" in Chicago, it is begging the question for the Court of Appeals and the Supreme Court of Illinois to discuss the problem simply in terms of maintaining a "place of business" there.

related to traffic safety or any other legitimate concern of the City. Here the City seeks to impose upon petitioner the same financial supervision that it exercises over public taxicabs whose rates and service are under the City's control. Additionally petitioner and the railroads are subject to the jurisdiction of the Interstate Commerce Commission in respect to the financial matters which the City here seeks to supervise. 49 U. S. C. 302(c)(2); *Chicago* v. *A. T. & S. F. Ry. Co.*, 357 U. S. 77, 86-87.

The restriction that only residents of Chicago may be employed as chauffeurs is obviously unreasonable and unrelated to traffic safety, particularly in view of the fact that Chicago is closely packed in on three sides by numerous separate residential municipalities. Long ago this Court condemned a provision of an ordinance of the City of New York which had the practical effect of limiting drivers of express wagons to residents of that city. *Adams Express Co.* v. *New York*, 232 U. S. 14, 34 (1914):

> "When . . . the obvious convenience of their being able to secure drivers in Jersey City as well as in New York, are considered, the provision would seem to be unnecessarily burdensome."

Likewise, petitioner, a Delaware corporation authorized to do business in Illinois, cannot lawfully be compelled to maintain its principal place of business in Chicago. Such a requirement obviously would have a ruinously splintering impact upon enterprises engaged in interstate commerce. A corporation can have only one principal place of business. *Fairbanks Steam Shovel Co.* v. *Wills*, 240 U. S. 642, 646-647 (1916). Compare 28 U. S. C. § 1398, which requires an action to set aside an order of the Interstate Commerce Commission to be brought "only in the judicial district wherein is the residence or principal office" of the plaintiff. If every state or every city were to command that every corporation engaged in interstate motor

transportation must maintain its principal place of business within the territory of the legislative body, the result would be intolerable burdens of corporate proliferation or reorganization.

The City may not regulate interstate commerce in this fashion. Compare *Toomer* v. *Witsell*, 334 U. S. 385, 395-403, and concurring opinion, 407-409 (1948). The requirements of this ordinance are clearly distinguishable from those where a State or municipality requires out of state carriers to maintain registered agents and sufficient insurance coverage. In fact, Section 28-12 of the ordinance requires a terminal vehicle operator to carry adequate public liability insurance and this provision is not contested.

Petitioner has a justiciable complaint against this provision *now*. It would be improvident and oppressive to compel petitioner to suspend action for the removal of this shackle until it is actually ready to move its principal place of business to a more convenient location.

In at least three recent landmark decisions[4] this Court, acknowledging the power of State and local governments to regulate interstate carriers as to general safety matters, has struck down local regulatory measures which do not deal with safety of the carrier's operations but instead merely harass, obstruct or impede its interstate operation. Petitioner does not challenge the right of the City of Chicago to require its vehicles to "obey traffic signals, speed limits and other general safety regulations" nor does it challenge the right of the City of Chicago to "exact reasonable fees for [its] use of the local streets." Petitioner has consistently obeyed all safety regulations and paid all fees exacted by the City and State for use of the streets.

This Court in *Atchison* clearly pointed out that the City

4. *Chicago* v. *Atchison, Topeka & Santa Fe Railway Company*, 357 U. S. 77; *Castle* v. *Hayes Freight Lines, Inc.*, 348 U. S. 61, 64; *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U. S. 520, 529.

has no power to regulate petitioner in respect to the matters in controversy when it said:

> "National rather than local control of interstate railroad transportation has long been the policy of Congress. It is not at all extraordinary that Congress should extend freedom from local restraints to the movement of interstate traffic between railroad terminals." (357 U. S. at 87-88).

The total lack of relationship between the contested regulations and safety, and the inclusion of the elements of public convenience and necessity which petitioner must prove to establish that it is "qualified to pursue the occupation of a . . . coachman," make it clear that in this ordinance as amended the City has attempted to cancel the mandate of this Court in *Atchison*. That attempt should be struck down by the Court.

II.

THE INSTANT ACTION IS APPROPRIATE AND IS NOT PREMATURE, AND THE CONTRARY HOLDING OF THE COURT OF APPEALS IS IN CONFLICT WITH DECISIONS OF THIS COURT.

The judgment of the Court of Appeals was the following: "No actual controversy has been presented to the District Court as required by 28 U. S. C. A. § 2201" (the declaratory judgment provision). 358 F. 2d at 59 (R. 155). While the Court's reasons for this conclusion do not seem clear, apparently the Court decided that the ordinance is not unequivocally invalid on its face and that petitioner must await until the ordinance is forcibly applied before seeking judicial relief. The Court apparently overlooked that petitioner has been advised by the City on *at least two occasions* that it must comply fully with all provisions of the ordinance or be barred from using the streets. (R. 66, 125-128.) The Court conceded that "the ultimate aim of the

ordinance is not clear," that "it is true that its relation to safety is not in all respects self-evident", and that "As it stands, the ordinance cannot be unequivocally classified and, until it is applied, it lacks the test whereby its real nature is revealed." 358 F. 2d at 58. (R. 153-154.)

The Court was plainly in error and its concessions emphasize its error. The ordinance is invalid on its face in the particulars set forth above, and petitioner is entitled to seek judicial relief without submitting to the Commissioner *every year* the issue whether petitioner is "qualified to pursue the occupation" of transferring passengers, and to test the other questioned provisions. *Chicago* v. *Atchison, Topeka and Santa Fe Ry. Co.*, 357 U. S. 77, 89.

To compel petitioner to file annually an application which, by the express terms of § 28-6, the City reserves the right to deny, is of itself a violation of petitioner's rights under the Interstate Commerce Act and the Commerce Clause. *Public Utilities Commission of California* v. *United States*, 355 U. S. 534 (1958):

> "[W]here the only question is whether it is constitutional to fasten the administrative procedure onto the litigant, the administrative agency may be defied and judicial relief sought as the only effective way of protecting the asserted constitutional right." (p. 540.)

Petitioner cannot be compelled to submit to the City's discretion what it is entitled to have as a matter of right.

Petitioner has the responsibility of transferring thousands of railroad passengers between Chicago stations every day and it must maintain an adequate fleet of specialized motor vehicles and a highly experienced staff. It cannot be subjected to the uncertainty every year as to whether a city official, representing an obviously unfriendly City Council, is going to certify that it is "qualified to pursue the occupation" of transferring passengers. It

cannot be compelled to seek the City's grace in that respect. The fact that licenses were issued to petitioner in 1960 does not, under the specific terms of the ordinance, bind the City to issue them in subsequent years. *The uncertainty in that regard was deliberately created by the City.* No better case for declaratory relief could be imagined.

The terms of the ordinance are proof of the City's hostility to petitioner, and this obvious hostility furnishes ground for the relief which petitioner seeks. If the City had wanted to enact a provision under which petitioner could obtain vehicle licenses by the simple procedures which the states follow in licensing annually many millions of trucks, buses, and automobiles, it could have done so easily. Those methods are matters of common knowledge. That sort of licensing is all that the City is entitled to demand. But the City most conspicuously was not satisfied with that. By an entirely independent clause the City delegated to its Public Vehicle License Commissioner the discretion to decide annually, on some basis not disclosed, whether petitioner is "qualified to pursue the occupation of" performing the transfer service. The City also amended Chapter 28 to compel petitioner to file extensive financial data with the City, to open its books to City inspection, and to maintain its principal office in Chicago. In the face of all of this hostility petitioner is in constant danger of stoppage of its operations and cumulative criminal penalties (§ 28-32, R. 26) unless the relief here sought is granted. Petitioner is entitled to relief now. *Frozen Food Express* v. *United States,* 351 U. S. 40, 44 (1956); *Atchison,* 357 U. S. at 89.

In the *Atchison* litigation counsel for the City represented that petitioner had no reason to fear that the public convenience and necessity provision would be enforced according to its literal terms. 357 U. S. at 85. In the case at bar counsel for the City in their brief opposing certiorari

expressed the view that petitioner has no justiciable right to fear literal application of the terms of the ordinance (pp. 4, 5, 7, 8, 11). One fault with this sort of representation is that it comes from sources that have no right to make it. Only the Chicago City Council can speak on this subject, and its power "can only be exercised by it through ordinances duly passed." *People* v. *Clean Street Co.*, 225 Ill. 470, 479, 80 N. E. 298, 300 (1907).

The Council has passed the ordinance here in issue, and counsel for the City have no power to say that it will be enforced otherwise than as it is written. *Id.* It remains in effect as written, and subject to full enforcement, until it is repealed by the Council, irrespective of views of administrative officials. *City of Metropolis* v. *Gibbons*, 334 Ill. 431, 437, 166 N. E. 115, 118 (1929). In determining Constitutional rights, the words of the ordinance "must be taken as they read upon their face. . . . They cannot be qualified by speculation as to what is likely to happen in fact." *Kansas City Southern Railway Co.* v. *Kaw Valley Drainage District*, 233 U. S. 75, 78 (1914).

The Court of Appeals (358 F. 2d at 57-58, R. 152-153) relied exclusively upon *Continental Baking Co.* v. *Woodring*, 286 U. S. 352 (1932), and plainly erred in its application of that decision to the case at bar. The Kansas statute construed in *Continental Baking* was markedly different from the Chicago ordinance. Under the express terms of the statute the Kansas Public Service Commission did not have authority, similar to that granted by § 28-6 of the ordinance, to refuse a license to the type of "private" carrier whose status corresponded to that of petitioner (p. 365). Thus the Kansas statute, unlike the Chicago ordinance, was not invalid on its face.

The opinion in *Continental Baking* (p. 368) distinguished that case from *Smith* v. *Cahoon*, 283 U. S. 553 (1931). In the case at bar and in *Smith* v. *Cahoon* the carrier is faced

with threatened enforcement of the plain terms of a statute that unlawfully invests the administrative authority with discretionary power to deny the license. Distinguishing *Smith* v. *Cahoon* the Court pointed out in *Continental Baking* that in the latter "[T]he statute itself clearly distinguishes in fundamental matters between the obligations of public and private carriers and places upon the latter certain requirements which the State had power to impose." (286 U. S. at 368.) *Smith* v. *Cahoon* sustains petitioner's right to the injunctive relief sought here and was relied upon by the Court on this question in *Atchison*, 357 U. S. at 89. It should be noted that in its recitals from *Continental Baking* the Court of Appeals (358 F. 2d at 57-58, R. 152-153) omitted all references to this Court's language distinguishing that case from *Smith* v. *Cahoon*.

Moreover, since *Continental Baking* was decided (1932) Congress has by § 202(c) of the Interstate Commerce Act, 49 U. S. C. § 302(c), 56 Stat. 300, specifically "extend[ed] freedom from local restraints to the movement of interstate traffic between railroad terminals." 357 U. S. at 87-88.

The last paragraph of the Court's opinion in *Atchison*, 357 U. S. at 89, is altogether applicable here:

> "Since we hold that § 28-31.1 is completely invalid insofar as it applies to Transfer, that company was not obligated to apply for a certificate of convenience and necessity and submit to the administrative procedures incident thereto before bringing this action. See *Smith* v. *Cahoon*, 283 U. S. 553, 562; *Public Utilities Commission of California* v. *United States*, 355 U. S. 534, 539-540. Cf. *Staub* v. *City of Baxley*, 355 U. S. 313, 319."

CONCLUSION.

The Court should hold that insofar as they apply to petitioner the contested provisions of Chapter 28 of the Municipal Code of Chicago are invalid under the Interstate Commerce Act and the Commerce Clause of the Constitution.

Respectfully submitted,

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APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

Railroad Transfer Service, Inc., a Delaware corporation,
Plaintiff-Appellant,
vs.
City of Chicago,
a municipal corporation, et al.,
Defendants-Appellees.

Appeal from the United States District Court of the Northern District of Illinois, Eastern Division.

July 20, 1964

Before SCHNACKENBERG, KNOCH and CASTLE, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* On December 13, 1963, Railroad Transfer Service, Inc., a Delaware corporation, plaintiff, appealed from a judgment of the district court entered November 27, 1963 dismissing plaintiff's first amended complaint filed October 31, 1963, which prayed for a declaratory judgment that section 28-1, *et seq.* of the municipal code of Chicago be held unconstitutional and void, and that the city and other defendants be enjoined from enforcing it against plaintiff.

The facts are not in dispute. Plaintiff has its principal place of business in the City of Chicago, and, under contracts with the railroads, which operate to and from Chicago rail terminals, it transports rail passengers and bag-

gage between said terminals. Otherwise it does not operate as a for-hire carrier. All of the railroad terminals which are served by Transfer are located in the downtown area of Chicago.[1]

On August 24, 1959, defendant city by ordinance amended its existing § 28-1 of the municipal code relating to public passenger vehicles, and thereby expressly defined the term "Terminal Vehicle" in such a way as to describe plaintiff's service and imposed a specified annual license fee for each such vehicle. The ordinance also granted to the Public Vehicle License Commissioner of the city authority to determine the financial responsibility of the licensee, and whether vehicles are safe as well as comfortable, as well as other powers of supervision over plaintiff's vehicles. The ordinance also required that plaintiff maintain its principal office in the City of Chicago, that its drivers reside in that city and that the color of its vehicles be approved by the Commissioner.

Under date of September 15, 1961, the Commissioner by letter notified plaintiff that unless it applied for licenses for its vehicles by September 22, 1961, it was to cease operation until the ordinance had been fully complied with.

This litigation followed.

After plaintiff filed its brief in this court on March 17, 1964, defendants filed their brief here on May 6, 1964 and stated therein that the City of Chicago on July 1, 1963 amended the ordinance here involved so that § 28-15.1 now provides:

> In the event that the Commissioner [Public Vehicle License Commissioner] after investigation and hearing, shall determine that any licensee . . . shall fail to carry out any representation made to the Commis-

1. This service is described in our earlier decision in *Atchison, Topeka & Santa Fe Railroad Company* v. *City of Chicago*, 240 F. 2d 930 (1957), affirmed, 357 U. S. 77-88 (1958).

sioner before the issuance of such license, or shall wilfully make any material misstatement of fact on any statement filed with the Commissioner, or if any . . . coachman [plaintiff is a coachman under section 28-1 (m) of said ordinance as amended July 1, 1963, p. 575 of said Council Proceedings] while in charge of a public passenger vehicle, as a chauffeur, shall operate any public passenger vehicle in violation of the provisions of this chapter or of the rules and regulations of the Commissioner relating to the administration and enforcement of the provisions of this chapter, the Commissioner may recommend to the Mayor that all public passenger vehicle licenses held by him be revoked and the Mayor, in his discretion, may revoke said licenses.

Theretofore said section read as follows:

28-15.1 *Discretionary Revocation of License.*) If any public passenger vehicle license was obtained by application in which any material fact was omitted or stated falsely, or if any cabman or coachman, while in charge of a public passenger vehicle as a chauffeur, shall operate any public passenger vehicle in violation of the provisions of this chapter or of the rules and regulations of the commissioner relating to the administration and enforcement of the provisions of this chapter, the commissioner may recommend to the mayor that all public passenger vehicle licenses held by him be revoked and the mayor, in his discretion, may revoke said licenses.

Plaintiff, when it filed its reply brief on June 1, 1964, stated that the reading of defendants' brief was the first time that plaintiff learned of this amendment of the ordinance. It contends with considerable logic that the date of this amendment to the ordinance was prior to the time that defendants filed a motion to strike the first amended complaint, which was November 21, 1963, "almost four months after the ordinance had been amended eliminating 'terminal vehicles' from its scope." Plaintiff points out

that it was on November 27, 1963 that the court's final order was entered herein.

Plaintiff argues from these facts that the copy of the ordinance attached to defendants' motion to dismiss had been amended four months earlier, and yet the defendants were silent about the "sweeping amendment". If so, it contends that the district court ruled without knowledge that the ordinance it was construing had been materially amended four months earlier; and that "terminal vehicles" had been removed from the ordinance. This amendment was disclosed to us for the first time in the defendants' brief filed in this Court. We express no opinion at this time as to this phase of the appeal.

In order that complete justice may be done in this case under these unusual circumstances, it is the order of this court that the judgment of the district court be vacated and this cause remanded to that court for further proceedings consistent with the facts now appearing in the record before us.

JUDGMENT VACATED AND CAUSE REMANDED WITH DIRECTIONS.

APPENDIX B.

EXTRACTS FROM CHAPTER 28, "PUBLIC PASSENGER VEHICLES," OF THE MUNICIPAL CODE OF CHICAGO.

Sec. 28-1 Definitions

"Chauffeur" means the driver of a public passenger vehicle licensed by the city of Chicago as a public chauffeur. (1952, 1959, 1963.) (R. 21, 29, 35.)

"Person" means a natural person, firm or corporation in his own capacity and not in a representative capacity. (1951, 1959, 1963.) (R. 21, 29, 34.)

"Cabman" means a person engaged in business as proprietor of one or more taxicabs. (1951, 1959, 1963.) (R. 21, 29, 35.)

"Coachman" means a person engaged in business as proprietor of one or more taxicabs. (1951, 1959, 1963.) (R. 21, 29, 35.)

"Coachman" means a person engaged in business as proprietor of one or more terminal vehicles (1951), livery vehicles, sight-seeing vehicles or terminal vehicles. (1959, 1963.) (R. 21, 29, 35.)

"Terminal vehicle" means a public passenger vehicle which is used exclusively by a coachman under contract with railroad or steamship carriers for the transfer of their passengers and hand baggage en route in interstate travel between railroad terminals and steamship docks pursuant to through route published tariffs. (1959.) (R. 29, 46.)

Sec. 28-4. No vehicle shall be licensed as a public passenger vehicle until it has been inspected under the direction of the commissioner and found to be in safe operating condition and to have adequate body and seating facilities which are clean and in good repair for the comfort and convenience of passengers. (1952.) (R. 21.)

Sec. 28-4.1. No vehicle shall be licensed as a public passenger vehicle unless it has two doors on each side, and no vehicle having seating capacity for more than eight adult passengers shall be so licensed unless it has at least two doors with fixed aisle space for access to said doors. (1959.) (R. 29.)

Sec. 28-5 Application. Applications for public passenger vehicle licenses shall be made in writing signed and sworn to by the applicant or, if applicant is a corporation, by its duly authorized agent, upon forms provided by the commissioner. . . . (1959.) (R. 30.)

Sec. 28-5.1 Qualifications. All corporate applicants for public passenger vehicle licenses shall be organized or qualified to do business under the law of Illinois and have their principal places of business in the city of Chicago. . . . (1959.) (R. 30.)

Sec. 28-6. Upon receipt of an application for a public passenger vehicle license the commissioner shall cause an investigation to be made of the character and reputation of the applicant as a law abiding citizen; the financial ability of the applicant to render safe and comfortable transportation service, to maintain or replace the equipment for such service and to pay all judgments and awards which may be rendered for any cause arising out of the operation of a public passenger vehicle during the license period. (1952.) If the commissioner shall find that the application, and all other statements and documents required to be filed with said application have been properly executed, and that the applicant is qualified to pursue the occupation of a cabman or coachman, the commissioner shall issue to him and in his name a license for each public passenger vehicle applied for, to terminate on the 31st day of December following the date of issue, provided that each said vehicle is registered in applicant's name and is in safe and proper condition at the time the license is issued. (1959.) (R. 22, 29.)

Sec. 28-14. If any public passenger vehicle shall become unsafe for operation or if its body or seating facilities shall be so damaged, deteriorated or unclean as to render said vehicle unfit for public use, the license therefor shall be suspended by the commissioner until the vehicle shall be made safe for operation. . . . (1951.) (R. 25.)

Sec. 28-30.1. Every cabman, *corporation* and affiliate shall keep and provide accurate books and records of account of his operations at his place of business in the city. On or before May 1 of each year, every cabman, *corporation* and affiliate shall file with the Commissioner a profit and loss statement for the preceding calendar year, showing all his earnings and expenditures for operation, maintenance and repair of property, depreciation expense, premium paid for workmen's compensation and public liability insurance, and taxes paid for unemployment insurance and social security, and all state and local license fees, property taxes and Federal income taxes, and a balance sheet taken at the close of said year.

The Commissioner, or the authorized committee of the Council, shall have access to the property, books, contracts, accounts and records during normal business hours at said place of business, for such information as may be required for the effective administration and enforcement of the provisions of this chapter, or for the adoption of any ordinances, rules or regulations affecting taxicab operations.

In addition to the foregoing reports, each cabman shall within thirty days after the six months' period ended December 31 and within thirty days after the six months' period ended June 30 of each year file a sworn statement with the Commissioner showing his gross fares collected and his operating expenses for the six months immediately preceding said dates.

(Part not italicized added in 1959, R. 30. Words italicized added in 1963. R. 44.)

APPENDIX C.

INTERSTATE COMMERCE ACT.

Sec. 1, 49 U. S. C. § 1, 54 Stat. 900.

(4) It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

Sec. 3, 49 U. S. C. § 3, 54 Stat. 903.

(4) All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specif-

ically routed by the shipper. As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III.

Sec. 202, 49 U. S. C. § 302, 56 Stat. 300.

(c) Notwithstanding any provision of this section or of section 203, the provisions of this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation and equipment, shall not apply—

(1) to transportation by motor vehicle by a carrier by railroad subject to part I, or by a water carrier subject to part III, or by a freight forwarder subject to part IV, incidental to transportation or service subject to such parts, in the performance within terminal areas of transfer, collection, or delivery services; but such transportation shall be considered to be and shall be regulated as transportation subject to part I when performed by such carrier by railroad, as transportation subject to part III when performed by such water carrier, and as transportation or service subject to part IV when performed by such freight forwarder;

(2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to part I, an express company subject to part I, a motor carrier subject to this part, a water carrier subject to part III, or a freight forwarder subject to part IV, in the performance within terminal areas of transfer, collection, or delivery service; but such transportation shall be considered to be performed by such carrier, express company, or freight forwarder as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water, or the freight forwarder transportation or service, to which such services are incidental.